

ALERTS

Labor & Employment Law Alert - Final Rule Expands FMLA Leave For Military Family Members And Airline Crew Employees

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On Feb. 6, 2013, the U.S. Department of Labor's Wage and Hour Division (DOL) published its Final Rule resulting in key changes to the Family and Medical Leave Act (FMLA) regulations. These changes include expanding FMLA leave for military family members and amending the hours of service requirements for airline crew personnel. The Final Rule will become effective on March 8, 2013.

Background Regarding the Final Rule for Military Family Members FMLA Leave

Since January 2009, eligible employees with a spouse, child or parent in the National Guard or Reserves have been entitled to FMLA leave for certain "qualifying exigencies" relating to the family member's military service deployment. Those qualifying exigencies relate to the military member's deployment and include: short notice deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional activities to which both the employer and eligible employee agree.

In addition to FMLA leave available for these qualifying exigencies, an eligible employee with a spouse, child, parent or next of kin currently in the Armed Forces has been entitled to "military caregiver leave" to care for a family member with a serious injury or illness incurred in the line of duty. The regulations previously stated, however, that leave was not available to care for former members of the Armed Forces (i.e., veterans).

In 2010, these particular provisions for military family members were amended by the National Defense Authorization Act. Those amendments expanded the availability and scope of military exigency leave and military caregiver leave. The Final Rule implements and explains those specific amendments.

Changes for Military Family Members FMLA Leave

Highlights of the Final Rule's key changes to the regulations include:

- The regulations clarify that FMLA qualifying exigency leave is now available to employees with a spouse, son, daughter or parent in the regular Armed Forces deployed to a foreign country. Previously, such leave only was available to family members of individuals serving in the National Guard or Reserves.
- FMLA qualifying exigency leave also includes leave for parental care under limited circumstances. If the military member's parent is

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incapable of self-care and the need for care has been necessitated by the military member's active duty or call to active duty, the eligible employee may take FMLA leave to make arrangements for the military member's parent's care, including leave to address admissions or transfers to appropriate care facilities and to attend necessary meetings at those facilities.

- The amount of qualifying exigency leave that can be taken to spend time with a service member who is undergoing short-term rest or recuperation during a period of deployment has increased from five days to 15 calendar days.
- Qualifying exigency leave is generally available if the service member has been deployed to a foreign country, or under other specified circumstances as described in the regulations.
- The regulations now reflect that military caregiver leave has been expanded to include leave to care for certain veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness. The definition of "covered service member" has been broadened include veterans who were members of the Armed Forces within the five-year period preceding the date of the service member's medical treatment, recuperation, or therapy.
- The definition of a serious injury or illness for military caregiver leave now includes preexisting conditions which were aggravated in the line of duty and which render the service member medically unfit.
- The DOL also created a new Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave, Form WH-385-V.

FMLA Leave for Airline Crew Employees

The Final Rule also implements the FMLA amendments to the hours of service requirements made by the 2009 Airline Flight Crew Technical Corrections Act (AFCTCA) and adds new leave calculation regulations for flight crew employees. Specifically, the Final Rule establishes the eligibility requirements for FMLA leave for airline flight crew employees. Now, an airline flight crew member will be eligible for FMLA if, during the previous 12-month period, the individual has worked or been paid for not less than 60 percent of the applicable monthly guarantee and has worked or been paid for not less than 504 hrs (not including commute time, vacation, sick, or medical leave).

Additionally, the Final Rule adopts a uniform entitlement for airline flight crew employees of 72 days of leave for one or more of the FMLA-qualifying reasons and 156 days of military caregiver leave. Employers also will be required to account for an airline flight crew employee's intermittent FMLA leave usage, utilizing an increment no greater than one day.

Finally, the Final Rule requires employers of airline flight crew employees to maintain certain records regarding its calculations of FMLA leave as well as other special record keeping requirements as established by the DOL.

New FMLA Poster and Certification Forms

Under the Final Rule, the DOL has published a new FMLA poster, which employers must begin using no later than March 8, 2013. Two other DOL certification forms have been revised as of February 2013, as well as the Notice of Eligibility form.

For more information of the key changes to the FMLA regulations as a result of the implementation of the Final Rule, the DOL issued a helpful side-by-side comparison analysis. See Final Rule Comparison.

To obtain more information, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor and Employment Law Department in the following offices:

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